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Denial of Social Host Liability for Furnishing Alcohol to a Visibly Intoxicated Guest in *Klein v. Raysinger*: A Failure in Judicial Reasoning*

I. INTRODUCTION

In *Klein v. Raysinger*,¹ the Pennsylvania Supreme Court held that a social host who serves alcoholic beverages to his or her adult² guests is not subject to liability under common law principles of negligence for injuries and damages sustained as the result of a subsequent motor vehicle accident involving the intoxicated adult guest.³ *Klein* involved a factual situation wherein the plaintiffs were the occupants⁴ of an automobile which was being lawfully driven on the Pennsylvania Turnpike when it was struck from behind by a vehicle driven by an intoxicated Mark Raysinger. Prior to the accident, Raysinger had been served alcoholic beverages at the home of Mr. and Mrs. William Gilligan and subsequent thereto had also been served at a bar.⁵ It was alleged by the plaintiffs that Raysinger was visibly intoxicated at the time he was served by the Gilligans, that they knew, or should have known, that he would be driving and that the Gilligans were, therefore,

* The author would like to thank Mrs. Alberta E. Broman for all of the typing she has done for him throughout his college and law school years.

1. — Pa. —, 470 A.2d 507 (1983).

2. In a case decided on the same day as *Klein*, *Congini v. Portersville Valve Co.*, — Pa. —, 470 A.2d 515 (1983), the Pennsylvania Supreme Court held that a social host who served intoxicating beverages to a minor can be subject to civil liability for injuries sustained by the minor or third parties as a result of a subsequent motor vehicle accident involving the minor. Liability was predicated on negligence per se because the furnishing of alcoholic beverages to a minor is a violation of the Pennsylvania Crimes Code, 18 PA. CONS. STAT. ANN. §§ 306, 6308 (Purdon 1983). 470 A.2d at 517-18. For a more complete discussion of *Congini*, see *Pennsylvania Supreme Court Review*, 1983, 57 TEMP. L.Q. 453 (1984).

3. *Klein*, 470 A.2d at 510-11.

4. The automobile was driven by Michael Klein with his family, Shirley, Myron and Phillip Klein, as passengers. Michael, Myron and Phillip sustained personal injuries as a result of the collision which caused the death of Shirley Klein. 470 A.2d at 508.

5. *Id.* There were two separate actions. One was brought by Michael Klein for personal injuries against Mark Raysinger, The Neptune Inn, Mr. and Mrs. William T. Gilligan and Michael Gilligan. A second action was brought by Myron Klein and Phillip Klein for personal injuries, and by Myron Klein as Administrator of the Estate of Shirley Klein, for personal injuries, survivorship and wrongful death. *Id.*

liable for the resultant injuries.⁶ The trial court sustained the demurrers of the social host defendants, after which the Superior Court of Pennsylvania upheld the lower court's rulings.⁷ The cases were then consolidated for appeal to the Pennsylvania Supreme Court.⁸

The supreme court relied upon three grounds to deny the existence of a cause of action in negligence. The court stated that such an action would be new; it did not exist at common law.⁹ Secondly, while not deferring the decision to the state legislature, the court nonetheless placed a great deal of emphasis on the role of legislatures in the extension of liability to social hosts.¹⁰ The final, and most important, basis for denial was, in accordance with the rule of common law, "that in the case of an ordinary able bodied man, it is the consumption of the alcohol, rather than the furnishing of the alcohol, which is the proximate cause of any subsequent occurrence."¹¹

On June 27, 1984, six months after *Klein* was decided, the New Jersey Supreme Court, in *Kelly v. Guinnell*,¹² held that a social host who served intoxicating beverages to a visibly intoxicated adult guest, whom he or she knew would thereafter be driving, was liable for injuries and damages suffered by an innocent third party which were due to the intoxication-related negligent driving of the adult guest.¹³ The legal reasoning of the New Jersey Supreme

6. *Id.*

7. *Klein v. Raysinger*, 298 Pa. Super. 246, 444 A.2d 753 (1982). In the action brought by the driver, Michael Klein, the Pennsylvania Superior Court, relying on *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973) (see *infra* notes 10, 49-51 and accompanying text), held that there was no cognizable cause of action at law. 298 Pa. Super. at 247-49, 444 A.2d at 753-54. In the action brought by the passengers, the superior court, in sustaining the demurrer, stated that any recognition of a new cause of action against social hosts would have to come from the legislature or the Supreme Court of Pennsylvania. *Klein v. Raysinger*, 302 Pa. Super. 248, 252, 448 A.2d 620, 623 (1982).

8. 470 A.2d at 508. See *supra* note 5.

9. *Id.* The court stated that a recognition of liability would constitute a "new cause of action." *Id.* Such ground is closely related to the theory that consumption is the proximate cause, and it implies a static view of the common law. See *infra* note 12 and accompanying text.

10. 470 A.2d at 509-510. The court in *Klein* never explicitly expressed deference to the legislature. In *Manning v. Andy*, however, the court did explicitly defer to the legislature in this area of law, declining to extend liability to non-licensed furnishers of alcohol. The court stated that "[w]hile appellant's proposal [to extend liability] may have merit, we feel that a decision of this monumental nature is best left to the legislature." 454 Pa. at 241, 310 A.2d at 76.

11. 470 A.2d at 510.

12. 96 N.J. 538, 476 A.2d 1219 (1984).

13. *Id.* at 548, 476 A.2d at 1224. The plaintiff, Marie Kelly, was seriously injured when

Court is in complete contrast to that employed by the Pennsylvania court. The liability found to exist in *Kelly* was based on common law principles of negligence and emanated from a duty owed to the public to refrain from the creation of foreseeable, unreasonable risks.¹⁴ The host who furnished the alcohol and the guest who consumed the alcohol were held liable as joint tortfeasors, thereby resolving any possible issue of proximate causation.¹⁵ Finally, the New Jersey Supreme Court dealt with the issue of legislative deference by asserting that New Jersey courts have traditionally decided the scope of duty in negligence causes of action.¹⁶

This comment will examine the legal reasoning of the Pennsylvania Supreme Court in each of the three issues before it in *Klein*. Attention will be focused upon comparisons of the Pennsylvania decision with the legal reasoning of the New Jersey Supreme Court in *Kelly v. Gwinnell*, as well as that employed in other jurisdictions. Finally, the *Klein* decision will be closely examined in light of established Pennsylvania negligence principles in order to determine the soundness of the decision.

II. COMMON LAW—IMMUTABLE OR ADAPTABLE?

A. *The Restrictive Approach of Klein*

In the absence of a statutory provision for a cause of action in tort, the principles of the common law became essential to the creation or recognition of a cause of action in negligence.¹⁷ The common law can be viewed either as a fixed, immutable set of principles, usages and rules which can be applied to meet any situation arising now, or in the future, or, instead, as flexible principles and rules which are adaptable to changing times.¹⁸

her automobile was involved in a collision with a car operated by an intoxicated Donald Gwinnell, who testified that he had two or three scotch drinks while at the home of Joseph and Catherine Zak. A blood test taken of Gwinnell showed a blood alcohol reading of 0.286 percent; a reading of 0.10 percent or more violated New Jersey law for driving while intoxicated. The expert retained by Kelly testified that Gwinnell had in fact consumed thirteen drinks and must have been visibly intoxicated while at the Zak's residence. *Id.*

14. *Id.* at 548, 476 A.2d at 1224.

15. *Id.* at 559, 476 A.2d at 1230. See *infra* notes 83-85 and accompanying text.

16. *Id.* at 552-59, 476 A.2d at 1226-29.

17. Although "common law" may be defined in a variety of ways, it is generally referred to as "those principles, usages and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express or positive declaration of the will of the legislature." *Bishop v. United States*, 334 F. Supp. 415 (S.D. Tex. 1971), *rev'd on other ground*, 476 F.2d 977 (5th Cir.), *cert. denied*, 414 U.S. 911 (1973).

18. See *infra* notes 22-31 and accompanying text.

The Pennsylvania Supreme Court, in *Klein*, treated the common law as if its rules were fixed and immutable. Justice McDermott, writing for the majority,¹⁹ stated that in accordance with, and as a consequence of, the recognized common law rule—that it is the consumption, not the furnishing, of alcohol which is the proximate cause of any intoxication-related occurrence—liability on the part of social host would be denied.²⁰ This rather mechanical adherence to a common law rule developed in the eighteenth century, coupled with the lack of any substantive discussion of the specifics of negligence principles seems to reflect a view of the common law as immutable. This restrictive, unchanging view of the common law rule—of consumption liability alone—is by no means a novel approach, but is in fact quite a common basis for denial of social host liability.²¹

B. Critique of the Klein Approach

This rigid adherence to ancient common law rules and principles is not in line with the general consensus which holds that the common law should not be static but instead has the vitality and capacity to grow with, and adapt to, a changing world.²² This view of the common law as something flexible and expansive has been followed by the Pennsylvania Supreme Court over the last ninety years and continues today.²³ In 1960, the supreme court used just

19. 470 A.2d at 507. Justices Nix, Flaherty, Hutchinson, and Zappala joined Justice McDermott's opinion. Chief Justice Roberts filed a dissenting opinion, as did Justice Larsen. *Id.* at 511.

20. *Id.* at 510. In *Congini* the court reiterated its reliance on the common law rule in arriving at a decision in *Klein*. 470 A.2d at 517. See *supra* note 2.

21. See *Miller v. Moran*, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); *Kowal v. Hoffer*, 181 Conn. 355, 436 A.2d 1 (1980); *Runge v. Watts*, 180 Mont. 91, 589 P.2d 145 (1979); *Garcia v. Hargrove*, 46 Wis. 2d 724, 176 N.W.2d 566 (1970); *Halverson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 458 P.2d 897 (1969); *Collier v. Stamatis*, 63 Ariz. 285, 162 P.2d 125 (1945).

22. *Maricopa County Mun. Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 81-82, 4 P.2d 369, 375 (1931) (the common law must be allowed to change or it will cease to be the common law and become a rigid code); *Funk v. United States*, 290 U.S. 371, 382-83 (1933). See also *Lembke v. Unke*, 171 N.W. 2d 837 (N.D. 1969) (court quoting leading justices and judicial thinkers on the flexibility of the common law).

23. For the historical development of, and adherence to, this view by the Pennsylvania Supreme Court, beginning with its first application and continuing to the present, see *Commonwealth v. Hess*, 148 Pa. 98, 23 A. 977 (1892) (common law must adapt to new phases and modes of doing business); *Jackman v. Rosenbaum Co.*, 263 Pa. 158, 175, 106 A. 238, 244 (1919) (common law which once held that any part of a party wall built on the land of another would constitute a trespass had to adapt to more densely populated areas to allow slight encroachment); *Nesbit v. Riesenman*, 298 Pa. 475, 148 A. 695 (1930); *Commonwealth v. Ladd*, 402 Pa. 164, 166 A.2d 501 (1960).

such an approach not only to change, but to abolish the common law evidentiary rule that no one may be responsible for a murder in which death occurs one year and a day after the fatal assault is committed.²⁴ The court noted improvements in forensic medicine, and then stated that "[a] rule becomes dry when its supporting reason evaporates: *cessante ratione legis cessat lex*."²⁵

It is clear that the changing conditions to which the common law is to adapt would include technological advances in general²⁶ and more specifically the technological development of the automobile.²⁷ In *Nesbit v. Riesenman*,²⁸ the Pennsylvania Supreme Court held that a public garage located in a residential area could be considered a nuisance.²⁹ The court specifically stated that when applying the principle that the common law is to adapt itself to modern conditions the automobile is to be considered one such development.³⁰ The court noted that the automobile can be injurious to health and safety and so should be considered a nuisance when applying common law principles.³¹

Generally, when courts have taken into consideration the development of the automobile and its effect on the common law, it has been done in the context of whether or not the particular occurrence was reasonably foreseeable in line with common law principles of negligence.³² This is precisely how the New Jersey Supreme

24. *Id.* (victim was struck by the defendant on September 21, 1958 and died on November 1, 1959).

25. *Id.* at 173, 166 A.2d at 506.

26. See *supra* notes 24-25 and accompanying text. See also *Smith v. Brennan*, 31 N.J. 353, 362, 157 A.2d 497, 501 (1960) (due to advances in medical technology an infant plaintiff could now recover for the negligent infliction of prenatal injuries); *New Orleans & N.E.R. Co. v. Watson*, 157 Miss. 243, 244, 128 So. 105, 106 (1930) (development of highly explosive and inflammable materials such as gasoline would allow for the expansion of liability for destruction of nearby property resulting from the negligent wreck of a train).

27. See *Ney v. Yellow Cab Co.*, 279 Ill. 2d 550, 117 N.E.2d 74 (1954) (involving the liability of a taxicab owner for damages resulting from the wreck of the taxicab which had been left negligently unlocked with the motor running, was stolen by a thief and then wrecked); *McIntosh v. Pennsylvania R.R. Co.*, 111 Ind. App. 550, 38 N.E.2d 263 (1941) (plaintiff was injured when struck by parts of an automobile which had collided with defendant's train).

28. 298 Pa. 475, 148 A. 695, *cert. denied*, 281 U.S. 754 (1930).

29. *Id.*

30. *Id.* at 483-84, 148 A. at 697.

31. *Id.*

32. See *supra* note 27. See also *Halverson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 458 P.2d 897 (1969), where Judge Finley, dissenting to the denial of social host liability under common law negligence principles stated:

[T]he freeway, the high-compression gasoline engine, and the high-speed automobile were also unknown to the common law. So were the social dangers resulting from the

Court handled the issue of social host liability in holding that the social host would be liable for serving a visibly intoxicated guest later involved in an automobile accident.³³ The court also stated that under common law principles there was a duty owed by the host to the public not to create foreseeable, unreasonable risks,³⁴ and that the possibility of the intoxicated guest being involved in an accident was clearly foreseeable.³⁵ In determining the fairness of imposing the duty and the reasonable foreseeability of the consequences, the court placed heavy emphasis on the widespread knowledge among the public regarding the high number of traffic fatalities and damages caused by the intoxicated driver of an automobile.³⁶

The Pennsylvania Supreme Court's failure to even discuss the possible existence of a recognition of social host liability under common law negligence principles is difficult to reconcile with its view of the common law as flexible, and its recognition of the effect on the common law of the development of the automobile.³⁷ The rigidity of its adherence to the pre-automobile common law principle that it is the consumption, rather than the furnishing, of alcohol that is the sole basis of liability seems directly at odds with its approaches elsewhere.³⁸ In light of this, one would have expected, at the very least, a discussion or recognition of the issue. One possible explanation for this lapse is that the court may have desired to defer such a decision to the legislature.

III. THE ROLE OF THE JUDICIARY IN THE FLEXIBLE COMMON LAW

A. *Deference to the Legislature*

It is a widely recognized and accepted legal philosophy that the judiciary is to defer to the legislature in areas which are deemed to

lackadaisical mixture of alcohol and gasoline. Times change, and the common law changes with the times—slowly, perhaps, but quite surely—as historical perspective clearly demonstrates . . . [T]here were no automobiles “at common law” capable of transformation by an inebriate from a useful mechanism into an engine of violence and destruction.

Id. at 765-67, 458 P.2d at 901 (Finley, J., dissenting). Similar thoughts are echoed in *Slicer v. Quigley*, 180 Conn. 252, 262, 429 A.2d 855, 860 (Bogdanski, J., dissenting).

33. *Kelly v. Gwinnell*, 96 N.J. at 556, 476 A.2d at 1228.

34. *Id.* at 547-48, 476 A.2d at 1224.

35. *Id.* at 544, 476 A.2d at 1222.

36. *Id.* at 544-45, 548-52, 476 A.2d at 1222, 1224-26, 1229.

37. See *supra* notes 28-31 and accompanying text.

38. See *supra* notes 23-25 and accompanying text.

involve the lawmaking function of the legislature.³⁹ When considering Pennsylvania's rather strict adherence to this philosophy,⁴⁰ it is surprising that the decision reached by Justice McDermott in *Klein* was not firmly grounded upon deference to the legislature. There is support in the laws of other states for the proposition that, in the absence of an action at common law, any recovery must be provided for by the legislature.⁴¹

The Pennsylvania Supreme Court in *Klein* never stated explicitly that its decision was based upon deference to the legislature regarding this particular issue. Quite to the contrary, the majority was most explicit in basing its decision on the common law rule that the consumption, rather than the furnishing of alcohol, was the proximate cause of any subsequent occurrence.⁴²

The court in *Klein*, however, did indirectly imply that a decision on social host liability is more appropriately within the sphere of the legislature. This may be discerned in the *Klein* court's reference to the California Supreme Court's finding of social host liability under negligence principles in *Coulter v. Superior Court of San Mateo*,⁴³ and to the Oregon Supreme Court's decision in *Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*,⁴⁴ which indicated a willingness to consider such liability.⁴⁵ Justice McDermott noted that the California legislature expressly abrogated the decision through a statutory enactment which also barred any future finding of social host liability.⁴⁶ It was further noted by the *Klein* court that the Oregon legislature also took the issue out of

39. *Tsarnas v. Jones & Laughlin Steel Corp.*, 488 Pa. 513, 523, 412 A.2d 1094, 1099 (1980) (social policies are to be addressed by the legislature, not by the courts); *Mt. Lebanon v. County Board of Elections*, 470 Pa. 317, 320, 368 A.2d 648, 649 (1977) (legislative power consists of the power to make, alter or repeal laws and the courts are not to encroach on this power). See generally *Hatcher v. Hatcher*, 265 Ark. 681, 580 S.W.2d 475 (1979); *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331 (1977).

40. See *supra* note 34 and accompanying text.

41. See, e.g., *Henry Grady Hotel Co. v. Sturgis*, 70 Ga. App. 379, 28 S.E.2d 329 (1943) (the court held there was no liability at common law for furnishing liquor to an intoxicated person and only the legislature could authorize such recovery). See also *American Auto Ins. Co. v. Molling*, 239 Minn. 74, 86, 57 N.W.2d 847, 855 (1953) (where the court stated that the common law doctrine of marital immunity was so well established that it had become, in essence, statutory and could thus only be changed by the state legislature).

42. 470 A.2d at 510-11. The majority stated, "We agree with this common law view, and consequently hold that there can be no liability on the part of a social host who served alcoholic beverages to his or her adult guests." *Id.*

43. 21 Cal. 3d 144, 577 P.2d 669 (1979).

44. 258 Or. 632, 485 P.2d 18 (1981).

45. 470 A.2d at 509-10.

46. *Id.* at 509.

the hands of its courts by statutory enactment.⁴⁷ The examples referred to by the majority are, however, the closest the court ever approaches to a concrete deference to the legislature.⁴⁸

In *Manning v. Andy*,⁴⁹ decided over ten years prior to *Klein*, the Pennsylvania Supreme Court did expressly state that the recognition of social host liability was of such monumental proportions that it was more appropriate for legislative determination.⁵⁰ On the surface this would seem to be a sufficient source upon which to rely in ascertaining the majority's philosophy in *Klein*, were it not for the *Klein* majority's distinction of *Manning*. The majority stated that the liability of a social host under common law negligence principles was one of first impression in Pennsylvania, and that *Manning* was to be viewed in the context of social host liability under Pennsylvania's statutory law.⁵¹ This returns any analysis to the four corners of the *Klein* decision and the court's failure to expressly defer to the legislature.⁵²

B. Judicial Activist Approach

The philosophy of judicial activism may be distinguished from the legislative deference approach discussed above. Judicial activism can be defined as a philosophy which allows appellate judges to depart from strict adherence to judicial precedent in order to shape new or progressive rules of law, an approach which may intrude on the functions of the legislature.⁵³ This approach can be, and has been, applied to the change of common law rules and prin-

47. *Id.* at 510. The Oregon statute, unlike that of California, does allow a finding of social host liability for damages incurred or caused by the furnishing of alcoholic beverages to a "visibly intoxicated" guest. *Id.* at 510 n.11.

The court also referred to action taken by the Minnesota legislature which amended its dram shop act to bar any action for social host liability. The majority further noted action taken by the Iowa legislature to preclude action against a social host under Iowa's dram shop statute. *Id.* at 509 n.8.

48. In the companion case to *Klein*, where the court found social host liability for damages resulting from the serving of minors, the decision was based on the Pennsylvania legislature's establishment of criminal liability for the serving of minors. The court perceived this as a "legislative decision to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age." *Congini*, 470 A.2d at 518. The social host liability found in *Congini* is therefore not based upon common law principles of negligence.

49. 454 Pa. 237, 310 A.2d 75 (1973). See *supra* note 10 and accompanying text.

50. *Id.* at 239, 310 A.2d at 76.

51. 470 A.2d at 508. See *infra* notes 102-13 and accompanying text.

52. See *supra* notes 42-51 and accompanying text; *infra* notes 108-11 and accompanying text.

53. BLACK'S LAW DICTIONARY 760 (5th ed. 1979).

ciples and is consistent with the belief that the common law should adapt to a changing society.⁵⁴ One of the basic justifications and pre-conditions for the assumption of such an active role by the judiciary—ignoring any sociological, public policy, or other theoretical justification given by the court—is that the common law rule or principle being modified or abolished was originally created by a judicial decision and being of such origin it is within the power of the court to rightfully change or modify the rule.⁵⁵ This power or ability of a court to change the common law is seen by some courts as an affirmative obligation on their part to provide for justice in a modern society.⁵⁶

For a court to engage in judicial activism does not mean that the legislature is ignored by the court. Quite to the contrary, a court can act within a framework in which it recognizes that the ultimate power to decide the subject matter at issue will rest with the legislature.⁵⁷

The New Jersey Supreme Court, in *Kelly v. Gwinell* adopted precisely such an approach when it affirmatively claimed a proper role in the decision to create liability while, at the same time, acknowledging that the ultimate power to make such a decision rests with the legislature.⁵⁸ The majority opinion in *Kelly* is premised upon the finding of common law negligence on the part of the so-

54. See *supra* notes 22-32 and accompanying text for examples of this concept.

55. See generally *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968) (in modifying absolute governmental immunity by allowing tortious liability involving use and operation of motor vehicles, court postulated that once the reason for a rule ceases, the rule itself ceases and in effect dissolves itself); *Yazoo & M.V.R. Co. v. Scott*, 108 Miss. 871, 67 So. 491 (1915) (establishing power of an appellate court to limit issues when awarding a new trial).

For a more complete discussion of judicial activism, see Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

56. See *Brown*, 183 Neb. at 434, 160 N.W.2d at 808. See also *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234 (1933) (change in common law libel regarding a defendant newspaper).

This perceived duty to adapt the common law when impelled by feelings of justice and concern for the public welfare was adopted earlier by the New Jersey courts in *Koplik v. C. P. Trucking Corp.*, 47 N.J. Super. 196, 135 A.2d 555 (1957). The superior court held that the doctrine of interspousal immunity would not cause the action to abate when the female plaintiff passenger married the defendant male operator *pendente lite*. *Id.* The supreme court reversed and held that common law immunity would persist except for the state statutory exception under which the parties in the involved case did not fall. See *Koplik v. C.P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958).

57. See Peck, *supra* note 55, at 290.

58. 96 N.J. at 552-55, 476 A.2d at 1226-27. See Peck, *supra* note 55, at 286. Even those such as Peck who favor an active role for the judiciary concede that the ultimate power lies with the legislature, which can revise or repudiate the attempted reform. *Id.*

cial host.⁵⁹ The court had no difficulty in finding that a social host by his action of serving a visibly intoxicated person, whom the host knows will soon be driving, has created the risk of a reasonably foreseeable injury.⁶⁰ The fundamental question thus became whether there existed a duty on the part of the social host to prevent this risk.⁶¹ The majority at this point affirmatively stated that it had been an historical function of the judiciary to determine the scope of duty in negligence cases and that its decision was therefore well within that permissible scope.⁶²

After proclaiming its proper role in establishing liability of the social host, the *Kelly* court replied to criticism⁶³ that the decision was one for the legislature to make. The majority first responded to the argument that the legislature was in a position to obtain the superior information necessary to make such an important decision. The court asserted that if the legislature disagreed with the court's establishment of social host liability the ultimate remedy was legislative modification.⁶⁴ The majority contended that while it may be true that more information could be gained through legislative study, the personal and financial destruction caused by intoxicated drivers was so obvious as to render insignificant the value

59. 96 N.J. at 544, 476 A.2d at 1222.

60. *Id.* In the instant case Zak had been served approximately thirteen drinks in the one or two hours he was at the Gwinnell house. *Id.* at 541, 476 A.2d at 1220. This led the court to conclude:

Under the facts here defendant provided his guest with liquor, knowing that thereafter the guest would have to drive in order to get home. Viewing the facts most favorably to plaintiff (as we must, since the complaint was dismissed on a motion for summary judgment), one could reasonably conclude that the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk, yet they continued to serve him even after he was visibly intoxicated. By the time he left, Gwinnell was in fact severely intoxicated. A reasonable person in Zak's position could foresee quite clearly that this continued provision of alcohol to Gwinnell was making it more and more likely that Gwinnell would not be able to operate his car carefully. Zak could foresee that unless he stopped providing drinks to Gwinnell, Gwinnell was likely to injure someone as a result of the negligent operation of his car.

Id. at 543-44, 476 A.2d at 1221-22.

61. *Id.* at 544, 476 A.2d at 1222. Whether or not such a duty should be imposed upon a social host was viewed by the court as essentially a question of fairness. *Id.*

62. *Id.* at 552, 555, 476 A.2d at 1226, 1228. The majority conceded that if the New Jersey Legislature had enacted a Dram Shop Act prior to their decision, such an enactment would present the basis for a significant, though not absolute, argument against finding social host liability. The theory being that the legislature considered the liability of all possible parties, including social hosts, and chose licensees as the only liable parties. *Id.* at 554, 476 A.2d 1227.

63. *Id.* at 560-70, 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

64. *Id.* at 554-55, 476 A.2d at 1227-28.

of legislative study.⁶⁵ Finally, the majority did not believe the decision ran contrary to the will of the public but rather was in step with what the court perceived to be a significant adverse public reaction against drunken driving.⁶⁶

C. Critique of the Pennsylvania Approach

As stated earlier in this comment, the approach which involves deference to the legislature in matters such as the change or modification of a common law rule or principle is widely recognized and accepted.⁶⁷ While not immune from attack by those favoring a more active role by the judiciary, the legislative deference approach is on solid historical ground.

On the issue of social host liability, the legislative deference approach is best exemplified by the dissent of Justice Garibaldi in *Kelly v. Gwinnell*.⁶⁸ Justice Garibaldi began by setting forth what she perceived to be the ultimate goal of imposing social host liabil-

65. *Id.* at 558, 476 A.2d at 1229. Justice Garibaldi, in her dissent, argued that the majority opinion failed to deal with the tremendous economic costs which may have to be borne by the social host. *Id.* at 568-69, 476 A.2d at 1234-35 (Garibaldi, J., dissenting). The majority responded by stating that the loss should not be borne solely by the innocent victims and that by imposing liability on the social host the loss is actually being spread out further than before. The court then maintained, without support, that social hosts will be covered by their homeowners insurance. Ultimately, however, the majority was simply more concerned with the destructive effects of drunk driving than with the economic fate of those furnishing alcohol to visibly intoxicated guests. *Id.* at 557-58, 476 A.2d at 1229.

66. *Id.* at 558-59, 476 A.2d at 1229. Peck raises the following argument on judicial activism:

One of the arguments that might be made against this realistic approach to problems of government is that it conflicts with our democratic faith. In a society dedicated to representative government there is legitimate concern about judicial methods of policymaking. After all, even if elected, judges are not chosen for their abilities to represent or respond to public pressures.

However, Peck recognizes the counterargument:

They are, however, men trained by their profession to exercise self-restraint. They are certainly capable of distinguishing between the problems that would arise if they acted in conflict with legislative pronouncements and the problems of action in an area in which no such conflict exists. The judge who makes that distinction is as responsive to the electorate as the legislature which enacted the statute. Indeed, to argue that judicial creativity properly confined to areas where no conflict with representational determinations exists is contrary to our democratic traditions is to argue that one of those traditions is itself in conflict with the others. Quite clearly, the common law today is not what it was at the founding of this nation, and the ability of judges to change and adapt it to different circumstances has been one of the greatest achievements of our judicial system.

Peck, *supra* note 55, at 285-86. What prevents this from becoming a tyranny of the judiciary is, according to Peck, that the ultimate power lies with the legislature. *Id.* at 286.

67. See *supra* notes 39-51 and accompanying text.

68. 96 N.J. at 560-70, 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

ity—to reduce the personal and property damage suffered as the result of drunken driving and protecting the innocent injured party, while at the same time avoiding the placement of a heavy personal and financial burden on the average citizen.⁶⁹ Justice Garibaldi contended that the legislature was better equipped to effectuate this goal.⁷⁰

One reason advanced for deference to the legislature was that the majority had made its decision with insufficient information. The legislature, according to Justice Garibaldi, would have been better able to compile the information necessary to make a fully informed decision.⁷¹ The majority contended that one justification for the establishment of social host liability was the problem of the innocent victim.⁷² Justice Garibaldi responded by examining the legislatively enacted automobile insurance program of New Jersey, finding what she believed to be adequate protection for the party injured by the drunken driver.⁷³ She then stated that the legislature could further investigate the adequacy of the remedies available to the victims of drunken drivers.⁷⁴

While Justice Garibaldi did concede the possibility that a court

69. *Id.* at 560, 476 A.2d at 1230 (Garibaldi, J., dissenting).

70. *Id.* The dissent drew support from decisions of other states which Justice Garibaldi claimed stood for the proposition that the creation of social host liability is such a radical change from common law that such a decision is best made by the legislature. *Id.* at 561-62, 476 A.2d at 1231 (Garibaldi, J., dissenting).

For the cases cited by Justice Garibaldi, see *Kowal v. Hofher*, 181 Conn. 355, 436 A.2d 1 (1980); *Miller v. Moran*, 96 Ill.App.3d 596, 52 Ill. Dec. 183, 421 N.E.2d 1046 (1981); *Behnke v. Pierson*, 21 Mich. App. 219, 175 N.W.2d 303 (1970); *Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982); *Runge v. Watts*, 180 Mont. 91, 589 P.2d 145 (1979); *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969); *Schirmer v. Yost*, 60 A.D.2d 789, 400 N.Y.S.2d 655 (1977); *Edgar v. Kajet*, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct.1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976); *Klein v. Raysinger*, — Pa. —, 470 A.2d 507 (1983); *Halverson v. Birchfield Boiler, Inc.*, 76 Wash.2d 759, 458 P.2d 897 (1969).

71. 96 N.J. at 563-64, 476 A.2d at 1232-33 (Garibaldi, J., dissenting).

72. *Id.* at 557-58, 476 A.2d at 1229.

73. *Id.* at 564, 476 A.2d at 1232-33 (Garibaldi, J., dissenting). Justice Garibaldi pointed out that all motorists are required to carry uninsured motorist coverage; in the event the drunk driver is uninsured and insolvent, the victim's insurance should cover at least part of the damages. Were the victim an uninsured pedestrian, Justice Garibaldi asserted that an unsatisfied judgement could be satisfied from New Jersey's Unsatisfied Claim and Judgment Fund. The only victim which Justice Garibaldi claimed was not protected was the uninsured drunk driver himself. *Id.*

74. *Id.* at 564, 476 A.2d at 1233. The dissent also mentioned possible problems with insurance coverage for the social hosts and the resultant economic problems and consequences which emanate from the necessity of procuring sufficient coverage. The dissent did not specifically mention that the legislature was the proper party to consider this problem, although one may reasonably infer that such would be endorsed by the dissent. *See id.* at 568, 476 A.2d at 1235 (Garibaldi, J., dissenting).

may be forced to act in certain situations without any legislative guidance, she did not believe that such guidance was lacking in the instant case. A recent legislative enactment in New Jersey created a criminal penalty for serving alcohol to a minor. The absence in the bill of the imposition of a criminal penalty on social hosts for serving adults was seen by Justice Garibaldi as reflecting a clear legislative intent that no such penalty should exist in tort law.⁷⁵ The dissenting opinion concluded with a mention of the wide variety of possible remedies available to the injured parties which fall short of what Justice Garibaldi perceived as the unlimited liability imposed on the public by the majority.⁷⁶

The Pennsylvania Supreme Court, in *Klein*, however, chose not to directly discuss deference to the legislature.⁷⁷ Furthermore, there exists the discrepancy between the approach of the Pennsylvania Supreme Court in *Manning*, where it was held that the decision on social host liability was a matter reserved to legislative resolution, and the approach of the *Klein* court which followed the common law.⁷⁸ If the *Klein* court had taken the widely accepted *Manning* approach of deference to the legislature, the decision would have been unsusceptible to any substantive attack on the grounds of defective legal reasoning.⁷⁹

The *Klein* court decided that the proximate cause could not be the serving of intoxicating beverages to the intoxicated guests.⁸⁰ As stated earlier, the *Kelly* court approached the issue as one of deciding the scope of duty in tort law, a function which it believed to be within the sphere of the judiciary.⁸¹ The Pennsylvania Superior Court has also recognized that it is the role of the court to define the limitations on liability.⁸² This being the case, the discussion must now turn to the quality and consistency of the legal reasoning of the *Klein* court in light of relevant Pennsylvania case law re-

75. *Id.* at 569, 476 A.2d at 1235 (Garibaldi, J., dissenting).

76. *Id.* at 569-70, 476 A.2d at 1235-36 (Garibaldi, J., dissenting). The alternatives include creating a fund for victims by obtaining contributions from intoxicated motorists, requiring a successful suit against the intoxicated driver as a prerequisite to a suit against the social host on secondary liability, placing a ceiling on the amount of recovery from the social host, and requiring a finding of wanton and reckless conduct in order for the social host to be held liable. *Id.*

77. *See supra* notes 49-51 and accompanying text.

78. *Id.*

79. *See supra* note 39 and accompanying text.

80. 470 A.2d at 510-11.

81. 96 N.J. at 552, 476 A.2d at 1226.

82. *Wisniewski v. Great Atlantic and Pacific Tea Co.*, 226 Pa. Super. 574, 581, 323 A.2d 744, 748 (1974).

garding the issue of proximate causation.

IV. PROXIMATE CAUSATION AND SOCIAL HOST LIABILITY

A. *The Pennsylvania Approach*

To reiterate, the Pennsylvania Supreme Court engaged in only a cursory analysis of the issue of proximate causation in social host liability cases. The court stated that in regard to the normal adult, "it is the consumption of the alcohol, which is the proximate cause of any subsequent occurrence."⁸³ This passage constitutes the entire discussion by the majority on the issue of proximate causation.⁸⁴ The court failed to attempt even a consideration of the possibility of multiple causation. This approach to the issue of social host liability, grounded in common law negligence principles, is one that has been echoed time after time by courts of other states in order to deny liability.⁸⁵

B. *The New Jersey Approach*

In contrast to the traditional rationale offered by the court in *Klein*, the New Jersey Supreme Court in *Kelly v. Gwinell* engaged in a principled discussion of social host liability under general common law negligence principles. After establishing both the power of the court to change or modify the common law and the court's historical function in determining the scope of duty in neg-

83. 470 A.2d at 510.

84. The court cites Annot., 97 A.L.R. 3d 528, 533 (1980), and 45 AM. JUR. 2d *Intoxicating Liquors* § 553 (1969), for support of the common law rule that it is the consumption not the furnishing of the alcohol which constitutes the proximate cause. 470 A.2d at 510.

The A.L.R. volume cites to Am. Jur. for support; Am. Jur. cites in support: *Cherbonnier v. Rafalovich*, 88 F. Supp. 900 (D.C. Alaska 1950); *Nolan v. Morelli*, 154 Conn. 432, 226 A.2d 383 (1967); *Elder v. Fischer*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So.2d 328 (1966); *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966) [*overruled by Pence v. Ketchum*, 326 So.2d 831 (La. 1976)]; *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965); *Mitchell v. Ketner*, 64 Tenn. App. 656, 393 S.W.2d 755 (1965); *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); *Beck v. Groe*, 245 Minn. 28, 70 N.W.2d 886 (1955); *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); *Belding v. Johnson*, 86 Ga. 177, 12 S.E. 304 (1890).

However, the courts in *Cherbonnier* and *Elder* recognized that some states view the common law rule to be otherwise. *Cherbonnier*, 88 F. Supp. at 901-903; *Elder*, 247 Ind. at 604, 217 N.E.2d at 851.

85. See *supra* note 84. For several earlier decisions, see *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889) (plaintiff's decedent had been given two alcoholic drinks by the defendant, a social host, and died when he fell off his horse while intoxicated); *Woody v. Coenan*, 44 Iowa 19 (1876) (prior to legislative enactment, court held there was no right to recover for injuries resulting from sale of beer). But see *Rommel v. Schambacher*, 120 Pa. 579, 11 A. 779 (1887). For further discussion of *Rommel*, see *infra* notes 138-140 and accompanying text.

ligence,⁸⁶ the majority turned its attention to whether liability should exist on the part of the social host, and whether and to whom a duty is owed.

The majority began by positing a general test for the existence of the social host's duty: "whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or dangers to others."⁸⁷ The serving of alcohol to a visibly intoxicated guest, whom the host knows will soon thereafter be driving, was said to constitute precisely such a risk of injury to a third party and is hence negligent conduct on the part of the host.⁸⁸ The court continued by stating that once such negligent conduct creates the risk, the intoxicated driver then sets off the consequences foreseeable by the host resulting in injury to the plaintiff. The negligent conduct of the host is thus deemed a proximate cause of the accident resulting from the guest's intoxicated driving.⁸⁹ It is sufficient for the existence of liability that the proximate cause, i.e., the negligent conduct, was a "substantial factor" in causing the injuries.⁹⁰

The majority then discussed whether or not a duty should be imposed on social hosts. The court perceived this primarily as a question of fairness which involved "a weighing of the relationship of the parties, the nature of the risk and the public interest in the proposed solution."⁹¹ The court found that the policy of the state in deterring drunk driving⁹² and compensating victims of drunk drivers outweighed the interests of the host, both in terms of social relationships and possible consequences of economic liability.⁹³

86. See *supra* notes 32-36, 58-66 and accompanying text.

87. 96 N.J. at 543, 476 A.2d at 1221.

88. *Id.* at 543-44, 476 A.2d at 1221-22.

89. *Id.* at 543, 476 A.2d at 1221.

90. *Id.*

91. *Id.* at 544, 476 A.2d at 1222.

92. *Id.* at 544-45, 476 A.2d at 1222. The majority believed the policy of the state is exemplified by criminal sanctions against drunken driving in New Jersey which the Governor of New Jersey believes to be one of the toughest in the nation. *Id.*

93. *Id.* at 544-45, 548, 476 A.2d at 1222, 1224. The majority also found support for the extension of the duty to social hosts as part of a general trend in New Jersey case law. *Id.* at 545-47, 476 A.2d at 1222-24. The court in *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959), held a licensee liable in negligence for damages resulting from serving a minor who was subsequently involved in an accident. This was seen as a breach of duty to the public. In *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966), the duty of the licensee was extended to include that owed to the intoxicated customer himself. In so doing, the court negated the notion that the real fault rested with the consumer of the alcohol. Finally, in *Linn v. Rand*, 140 N.J. Super. 212, 356 A.2d 15 (1976), the Superior Court of New Jersey held that a social host who served a minor, knowing that the minor would there-

The majority also analogized the liability of social hosts for furnishing the alcohol to the liability imposed in some states on owners for entrusting their vehicles to persons whom they know to be intoxicated.⁹⁴ Finally, the court stated that the duty owed by social hosts to the public to refrain from creating foreseeable, unreasonable risks was no less than that owed by liquor licensees. That the licensee makes a profit while the social host does not was seen by the court to be irrelevant to the existence of the duty.⁹⁵

The New Jersey Supreme Court, unlike the *Klein* court, did not view the issue as being whether consumption or furnishing was the sole proximate cause. Instead, once the New Jersey court established both the elements of common law negligence and the duty owed to the public by the social host, it then proceeded to find liability on the part of both the social host and the intoxicated driver. This liability was extended to them as joint tort-feasors.⁹⁶

C. Critique of the Pennsylvania Approach to Proximate Causation

The decision reached by the Pennsylvania Supreme Court is based on the assertion that the consumption, rather than the furnishing of alcohol is the sole proximate cause of an ensuing accident. When this is viewed in light of the New Jersey approach and relevant Pennsylvania case law, it becomes obvious that the decision is the product of questionable legal reasoning.

Pennsylvania courts have recognized both the ability of the common law to adapt to modern conditions and the proper role of the court in determining the scope of duty in negligence law.⁹⁷ Furthermore, the *Klein* court chose not to invoke the doctrine of legislative deference, thus subjecting itself to criticism on its substantive legal reasoning. As a matter of consistent application of fundamental legal principles within the Commonwealth, the court should not only have found liability but should have felt compelled

after he driving, was liable for the resultant subsequent injuries suffered by a third party. 96 N.J. at 545-47, 476 A.2d at 1222-24.

94. *Id.* at 549, 476 A.2d at 1224. See generally *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956); *Pennington v. Davis-Child Motor Co.*, 143 Kan. 753, 57 P.2d 428 (1936); *Knight Gosselin*, 124 Cal.App. 290, 12 P.2d 454 (1932); *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922).

95. 96 N.J. at 547-48, 476 A.2d at 1224.

96. *Id.* at 559, 476 A.2d at 1230. No decision was made regarding contribution or indemnification between the joint tort-feasors. *Id.* The case was remanded for consideration in light of New Jersey's Comparative Negligence Act. *Id.* at 548-49 n.8, 476 A.2d at 1224 n.8.

97. See *supra* notes 23-31, 80-82 and accompanying text.

to do so.

The basic definitions and tests for negligence and proximate causation in Pennsylvania are consistent with those applied by the New Jersey court. The test for negligence in Pennsylvania is whether a person of ordinary intelligence could have reasonably foreseen the harmful consequences resulting from his act.⁹⁸ The requisite elements necessary to allow for the maintenance of an action in negligence are: a duty at law to conform one's behavior to a specified standard of conduct, a failure to conform to this standard, proximate causation and actual losses or damages suffered by the injured party.⁹⁹

In Pennsylvania, the test for proximate causation is, as in New Jersey, whether the defendant's negligent action was a "substantial factor" in producing the injury complained of by the plaintiff.¹⁰⁰ The "substantial factor" need not be the only cause of the injury and, in fact, there may exist in any given case two or more substantial factors.¹⁰¹

This substantial factor analysis of proximate causation was applied by the Supreme Court of Pennsylvania in *Majors v. Brodhead Hotel*¹⁰² to uphold a licensee's liability under the Pennsylvania Liquor Code.¹⁰³ Pennsylvania case law regarding the elements

98. *Scurfield v. Federal Laboratories, Inc.*, 335 Pa. 145, 149-50, 6 A.2d 559, 561 (1939). See also *Blake v. Fried*, 173 Pa. Super. 27, 95 A.2d 360 (1953).

99. *Morena v. South Hills Health System*, 501 Pa. 634, 642 n.5, 462 A.2d 680, 684 n.5 (1983).

100. *Jones v. Montefiore Hospital*, 494 Pa. 410, 416, 431 A.2d 920, 923 (1981) (involving medical malpractice). See also *Hamil v. Bashline*, 481 Pa. 246, 392 A.2d 1280 (1978). In this medical malpractice case the court held that once the plaintiff has sufficiently established that the defendant's acts were a substantial factor in causing the harm, in order to escape liability, the defendant must prove that this other cause would have produced said injury independently of his negligence. *Id.* at 266, 392 A.2d at 1285.

In *Whitner v. Hintz*, 437 Pa. 448, 263 A.2d 889 (1970) the court found the "substantial factor" test to be preferable to the "but for" test of proximate causation. The "substantial factor" analysis will not find substantiality, and hence no liability if the harmful result would have occurred in spite of the defendant's negligent conduct. The "but for" test on the other hand states that liability will exist where the harmful result would not have occurred "but for" defendant's negligent conduct. The court felt that the "but for" test did not allow for proper consideration of the foreseeability of the risk. *Id.* at 456-58, 457 n.6, 263 A.2d at 893-94, 894 n.6.

101. *Jones*, 494 Pa. at 416, 431 A.2d at 923. See also *Boushell v. J. H. Beers, Inc.*, 215 Pa. Super. 439, 258 A.2d 682 (1969) (plaintiff suffered stress both from blow to head, as well as from highway construction occurring near his house; and, while neither standing alone could cause an ulcer they could concurrently constitute a substantial factor and the plaintiff could recover).

102. 416 Pa. 265, 205 A.2d 873 (1965).

103. *Id.* The party recovering was the patron who had been served while intoxicated and as a result had injured himself. *Id.* at 267-68, 205 A.2d at 875. See *supra* note 100.

and tests for negligence and proximate causation is thus virtually identical to that of New Jersey. Therefore, the court in *Klein* was not constrained by precedent to follow the traditional view that the sole proximate cause was the consumption of alcohol.¹⁰⁴ Given this, the next step in the analysis is to ascertain whether or not, as a matter of Pennsylvania law, the court could have found the same duty owed by the social host to the public which was found in *Kelly*.¹⁰⁵

In Pennsylvania, a duty is predicated upon the relationship existing between the parties as well as the degree of foreseeability of the harmful consequence.¹⁰⁶ Furthermore, there exists a general duty to avoid causing another person harm.¹⁰⁷

These general duties alone should have been sufficient to find a duty to the public on the part of the social host. That there is no specific duty placed upon a social host for the serving of alcoholic beverages seems firmly established by the court in *Klein*; however, this view is not consistent with Pennsylvania law.

There does exist a duty owed by a licensee to both the public at large and the intoxicated drinker himself under the Pennsylvania Liquor Code.¹⁰⁸ This duty is, quite obviously, one that is legisla-

104. See *supra* notes 83-84 and accompanying text.

105. See *supra* notes 91-95 and accompanying text.

106. *Morena*, 501 Pa. at 642, 462 A.2d at 685; *Wicks v. Milzoco*, 291 Pa. Super. 345, 351, 435 A.2d 1260, 1263 (1981).

107. *Maize v. Atlantic Ref. Co.*, 352 Pa. 51, 41 A.2d 850 (1945).

108. *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965).

The duty owed by licensees to the public at large is found in the Pennsylvania Dram Shop Act which states:

No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employe when the said customer was visibly intoxicated.

47 PA. CONS. STAT. ANN. §4-497 (Purdon 1969). See also *Simon v. Shirely*, 269 Pa. Super. 364, 409 A.2d 1365 (1979), where the Pennsylvania Superior Court held that a third person injured by an intoxicated minor who had been served at a bar, would recover under §4-497 and not §4-493(1). *Id.*

There is also a duty owed to the intoxicated individual and possibly still to the public at large under another section of the Liquor Code which creates criminal liability:

For any licensee of the board, or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.

47 PA. CONS. STAT. ANN. §4-493(1) (Purdon 1969). Prior to the enactment of the dram shop act, this section of the Pennsylvania Liquor Code created a duty to the public at large and its violation constituted negligence per se. 416 Pa. at 268, 205 A.2d at 875-76. It is not at

tively, not judicially imposed. In *Manning v. Andy*, the court held that a social host was not covered by this liability-creating enactment of the state legislature, thus foreclosing the existence of a duty of the social host under section 4-493 of the Liquor Code.¹⁰⁹ The Pennsylvania dram shop act is quite explicit in stating that liability under that particular section of the Liquor Code is imposed on licensees only.¹¹⁰ Indeed, in support of the *Klein* decision, it could be argued that the state legislature has spoken on the non-existence of social host liability. This argument would state that when drafting the Liquor Code in general and the dram shop act in particular, the state legislature considered all of the possible persons upon whom liability might attach, i.e., who would owe a duty, and the legislature chose to find such a duty only for those mentioned in the statute. Social hosts were not among those so mentioned and, therefore, the legislature has spoken on social host liability.¹¹¹ The *Klein* majority, however, did not choose to base its decision on this argument, but instead chose to address the liability of social hosts on the substantive merits of common law negligence principles.

The issue of a duty for social hosts under the Pennsylvania Liquor Code could, however, ultimately be a question of statutory interpretation of the criminal liability provided for in section 4-493(1). This is best exemplified by the strong dissent of Justice Manderino in *Manning v. Andy*.¹¹² Justice Manderino argued that the language creating criminal liability for licensees, the board, employees of the licensees and "any other person"¹¹³ was meant to

present entirely clear if this section still indicates a duty to the public at large or only to the intoxicated patron himself. The superior court has hinted that §4-493(1) would still have vitality at least for injury to the intoxicated patron himself. *Simon v. Shirely*, 269 Pa. Super. at 367 n.5, 409 A.2d at 1366 n.5.

Interestingly, the duty imposed to refrain from furnishing liquor to a habitual drunkard is somewhat analogous to the duty imposed at common law to refrain from providing drugs to a known habitual user. A violation of this duty could serve as a basis for an action for loss of services, support and consortium. *Halverson v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 765, 458 P.2d 897, 901 (1969) (Finley, J., dissenting). See also Annot., 130 A.L.R. 352 (1941).

109. 454 Pa. 237, 310 A.2d 75. But see *id.* at 242-50, 310 A.2d at 76-81 (Manderino, J., dissenting); *Klein*, 470 A.2d at 511 (Roberts, C. J., dissenting).

110. 47 PA. CONS. STAT. ANN. § 4-497 (Purdon 1969).

111. See *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964).

112. 454 Pa. at 242-50, 310 A.2d at 76-81 (Manderino, J., dissenting). The dissent authored by Justice Manderino was thought of highly enough that Justice Larsen quoted it in its entirety as his dissent to *Klein v. Raysinger*, 470 A.2d at 511 (Larsen, J., dissenting).

113. 47 PA. CONST. STAT. ANN. § 4-493(1) (Purdon 1969). See *supra* note 108 and accompanying text.

include social hosts as a matter of *ejusdem generis*.¹¹⁴ Although the majority rejected the idea, it would nonetheless seem possible that at some point in the future the court may wish to adopt the position of Justice Manderino and find that a social host duty existed all along. Such theorizing is admittedly highly speculative. It would have to overcome the reading *in pari materia* of sections 4-498(1) and 4-497, as well as the argument that 4-497 was intended to cover the entire range of persons subject to tort liability. Given the *Klein* decision, such a result is unlikely.

On the same day that the *Klein* decision was handed down, the Pennsylvania Supreme Court decided *Congini v. Portersville Valve Co.*, in which liability for a social host was found to exist for the furnishing of intoxicating beverages to a minor. Liability was predicated on the Pennsylvania Crimes Code which makes it a crime to serve a minor.¹¹⁵ The court found a duty owed to both the minor and the public at large to be protected from "the perceived deleterious effects of serving alcohol to persons under twenty-one years of age."¹¹⁶

Justice Zappala dissented in *Congini*, putting forth the interesting postulate that the majority had, in effect, overruled *Klein*.¹¹⁷ The justice stated that if liability in *Congini* were based upon a public policy to protect the public at large, then such public policy could at some point in the future be manipulated to extend support to social host liability in a *Klein* situation.¹¹⁸ The dissent further contended that in *Congini* it was the knowledge of the social host regarding the inability of the guest to safely consume the alcohol which the majority used as a basis for creating liability.¹¹⁹ Justice Zappala found this to be entirely inconsistent with the *Klein* decision, thus placing the question of duty and liability once again in doubt.¹²⁰ The dissent demonstrates that while the *Klein* deci-

114. 454 Pa. at 246-48, 310 A.2d at 79-80 (Manderino, J., dissenting). It was the opinion of Justice Manderino that § 4-493(1) created a standard of care which, if violated, would establish criminal liability. The cause of action on the civil side should then be based on ordinary negligence principles patterned on this standard of reasonable conduct. *Id.* at 249, 310 A.2d at 81.

115. *See supra* note 2.

116. *Congini*, 470 A.2d at 518.

117. *Id.* at 520 (Zappala, J., dissenting).

118. *Id.* Specifically, Justice Zappala stated that the liability imposed on the social host for serving a minor is indistinguishable from the public policy behind Pennsylvania's drunk driving laws—that the public must be protected from intoxicated operators of motor vehicles. *Id.* at 520 n.2 (Zappala, J., dissenting).

119. *Id.* at 521 (Zappala, J., dissenting).

120. *Id.* at 520 (Zappala, J., dissenting).

sion not to extend liability to social hosts stands as good and valid case law, these perceived inconsistencies with *Congini* could conceivably provide, at some point in the future, a basis for a contrary holding by a more judicially active court.

The failure of the *Klein* court to find a duty on the part of the social host is also perplexing when one considers an analogous finding of such a duty by Pennsylvania courts—the duty imposed on the owner of a vehicle not to loan his car to an incapacitated individual. The New Jersey Supreme Court in *Kelly* analogized the liability imposed on the social host to the imposition of such liability on owners of vehicles who lend their automobiles to intoxicated individuals.¹²¹ The general duty which would underly liability in the two situations—furnishing alcohol to an intoxicated guest who will soon be driving, and the lending of a motor vehicle to the intoxicated person—is to protect the public at large from the disastrous consequences of drunken driving.¹²²

It has long been a part of Pennsylvania tort law that the owner of a motor vehicle is under a duty to refrain from loaning his vehicle to any person he knows to be an incompetent and that a violation of this duty can bring liability upon the owner.¹²³ The incompetency of the individual includes, but is not limited to, characteristics of recklessness or carelessness, lack of physical driving skill, minor status, and other physical or mental impairments.¹²⁴

121. 96 N.J. at 549, 476 A.2d at 1224. The majority stated:

The liability we impose here is analogous to that traditionally imposed on owners of vehicles who lend their cars to persons they know to be intoxicated. . . . If, by lending a car to a drunk, a host becomes liable to third parties injured by the drunken driver's negligence, the same liability should extend to a host who furnishes liquor to a visibly drunken guest who he knows will thereafter drive away.

Id. See also *Chalmers v. Harris Motors, Inc.*, 104 N.H. 111, 179 A.2d 447 (1962); *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956); *Pennington v. Davis-Child Motor Co.*, 143 Kan. 753, 57 P.2d 428 (1936); *Knight v. Gosselin*, 124 Cal. App. 290, 12 P.2d 454 (1932); *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922).

122. 96 N.J. at 548, 476 A.2d at 1224.

123. See *DeLair v. McAdoo*, 324 Pa. 392, 188 A. 181 (1936) (involving automobile with defective tires); *Raub v. Donn*, 254 Pa. 203, 98 A. 861 (1916) (young woman struck by automobile driven by a twenty-one year old man who had reputation for reckless driving).

124. *Laubach v. Colley*, 283 Pa. 366, 369-70, 129 A. 88, 89 (1925) (allowing a minor to operate a motor vehicle which was then wrecked was negligence on the part of the owner); *Raub*, 254 Pa. at 206-07, 98 A. at 862. See generally 75 PA. CONS. STAT. ANN. §§ 1501-1519 (Purdon 1977). But cf. *Chamberlain v. Riddle*, 155 Pa. Super. 507, 38 A.2d 521 (1944). The court acknowledged negligence for loaning a motor vehicle to a person known to be incompetent. However, the court held that the driver's failure to secure a license was not in and of itself proof of incompetency. *Id.* at 510, 38 A.2d at 523.

The question becomes whether a person known by the owner to be intoxicated will fall into the category of incompetent individuals. It seems fairly clear as a matter of Pennsylvania law that incompetents are to include intoxicated individuals. The leading case is *Gibson v. Bruner*,¹²⁵ which involved the allegation that the defendant/father had negligently entrusted his employer's truck to his visibly intoxicated son and should thus be liable for a subsequent accident involving the intoxicated son.¹²⁶ The Pennsylvania Supreme Court held that under the facts as presented¹²⁷ there was no evidence that the son was visibly intoxicated while in his father's presence, and, therefore, the father was held not liable.¹²⁸ The court, however, stated that the father "would not be liable for his son's transgressions *unless* he knew when he permitted [his son] to take the truck that, by reason of intoxication, he was unfit to drive the truck."¹²⁹ The court thus conceded that had the facts been different liability would exist for loaning the vehicle to the intoxicated adult. Similar liability on the part of an owner was found in *Washabaugh v. Fickes*,¹³⁰ an Adams County Common Plea Court decision.¹³¹

Finally, although an argument has not been made as such, it would seem that entrustment to an intoxicated driver could constitute negligence under the Motor Vehicle Code.¹³² In *Laubach v.*

125. 406 Pa. 315, 178 A.2d 145 (1961).

126. *Id.* at 316-18, 178 A.2d at 146.

127. Bernard Bruner, sub-foreman for a construction company, drove the company truck to one of his construction projects, taking along with him as his passenger, his son Edward Bruner. En route to their destination, they each had one or two beers. They then stopped at the home of one of Bernard Bruner's employees where Edward Bruner had one or two more beers. At this point, Bernard loaned the truck to his son. Two and one-half hours later, after drinking one or two more beers, Bernard was involved in a head-on collision. One of the two occupants of the other car died. His wife suffered serious and permanent injuries. Edward Bruner was visibly intoxicated at the time of the accident. *Id.* at 318-19, 178 A.2d at 146-47.

128. *Id.* at 321-22, 178 A.2d at 148.

129. *Id.* at 321, 178 A.2d at 148 (emphasis in original).

130. 9 Adams Co. L. J. 1 (1967).

131. *Id.* On August 28, 1965, an automobile, owned by Kenneth Flory and operated by Leroy Fickes, collided with a car driven by Herbert Washabaugh, resulting in the death of Mr. Washabaugh and injuries to the passengers of the Washabaugh vehicle. Mr. Flory was alleged to have been negligent both in loaning his automobile to Fickes, whom he knew at the time was too intoxicated to safely operate the vehicle, and in that he had allowed his car to be taken by Fickes without his consent. The defendant Fickes demurred that neither allegation constituted negligence. The court upheld the allegation of negligence for loaning an automobile to someone known to be intoxicated. The second allegation of negligence was struck as being inconsistent with the first. *Id.* at 1-3.

132. 75 PA. CONS. STAT. ANN. §§ 101-9009 (Purdon Supp. 1984).

Colley,¹³³ the Pennsylvania Supreme Court held that entrusting a vehicle to an individual by statute prohibited from operating a motor vehicle constituted grounds for an action in negligence.¹³⁴ While the statute relied upon has been repealed, vestiges of the statute do remain. In particular, section 1501(a) states that all persons, except those specifically exempted, must be licensed.¹³⁵ However, under section 1503, a person cannot obtain a license if he or she is "a user of alcohol or any controlled substance to a degree rendering the user incapable of safely driving a motor vehicle."¹³⁶ This would seem to bolster the argument that the class of incompetents was meant to include intoxicated drivers.

The court in *Klein* ignored the duty imposed on an owner not to knowingly lend his motor vehicle to a visibly intoxicated individual. The existence of such a duty lends strong support to a decision contrary to that reached in *Klein*. The court either did not appreciate this analogous duty or simply chose not to discuss it.

The failure of the *Klein* court to find a duty based on the aforementioned duties is puzzling, but when one considers *Rommel v. Schambacher*,¹³⁷ it seems inexplicable. *Rommel* involved a suit resulting from injuries sustained by the plaintiff, a minor, who was attacked in the defendant's tavern. The brutal assault was committed by a patron of the defendant whom the defendant had served while visibly intoxicated.¹³⁸ The court found that the tavern keeper owed a duty to his customers not to allow a drunken customer to harm other patrons.¹³⁹ This duty was found without the aid of a dram shop or other similar statute. As the court stated, "[a]ll this is a *plain matter of common law* and good sense, and does not depend on the act of 1854, or any other statute."¹⁴⁰ The argument of the *Klein* court that there does not exist a common law duty nor a cause of action for the furnishing of alcohol, in the absence of a statute, is thus incorrect as a matter of Pennsylvania law. The pri-

133. 283 Pa. 366, 129 A. 88 (1925). See *supra* note 124.

134. *Id.* at 369-70, 129 A. at 89. The prior statute provided: "No person, whether the owner of a motor vehicle or not, who is less than sixteen (16) years of age, or who is mentally impaired, or who is physically incapacitated as defined in this act, shall operate any motor vehicle upon any public highway in this Commonwealth." 1919 Pa. Laws 679, § 10.

135. 75 PA. CONS. STAT. ANN. § 1501 (1977).

136. *Id.* § 1503.

137. 120 Pa. 579, 11 A. 779 (1887).

138. *Id.* The attack consisted of the intoxicated patron pinning a piece of paper to the back of the plaintiff and lighting it. The plaintiff was severely burned as a result. This all occurred in clear sight of the tavern keeper. *Id.* at 581-82, 11 A. at 779.

139. *Id.* at 582, 11 A. at 779.

140. *Id.* (emphasis added).

mary reason for the court's failure to even discuss this duty is the majority's insistence that there be only one possible proximate cause.¹⁴¹ Whatever merit there is for such an approach evaporates when one considers that Pennsylvania law recognizes the concept of joint tort-feasors.

The Pennsylvania legislature manifested its recognition and approval of the concept of joint tort-feasors with its adoption of the Uniform Contribution Among Tort-feasors Act.¹⁴² The statute defines joint tort-feasors as "two or more persons jointly or severally liable in tort for the same injury to persons or property. . . ."¹⁴³ The remainder of the Act defines the rights of contribution, effects of judgments, releases of other tort-feasors, and the effect of such release on contribution.¹⁴⁴

In addition to the statutory law on the subject, Pennsylvania courts have recognized and further defined the law of joint tort-feasor liability. The concept of joint tort-feasorship was expounded upon by the superior court in *Lasprogata v. Qualls*.¹⁴⁵ The *Lasprogata* case involved a suit by an injured motorist against the treating physician, a manufacturer of surgical products, and a hospital.¹⁴⁶ The doctor, in turn, joined the other driver as a negligent third party whose acts were alleged to be the proximate cause of the injuries sustained by the plaintiff.¹⁴⁷ The issue, in essence,¹⁴⁸ became whether or not the driver whose negligence caused the accident and the doctor who later negligently treated the injured motorists were joint tortfeasors.¹⁴⁹ Judge Cercone, writing for the court, adopted the definition that joint tort-feasors are those parties who either act together in the commission of a wrong or those whose acts, although independent of one another, unite to cause a wrong.¹⁵⁰ Judge Cercone also stated that a joint tort exists "where two or more persons owe to another the same duty and by their

141. See *supra* notes 84-86 and accompanying text.

142. See 42 PA. CONS. STAT. ANN. §§ 8321-8327 (Purdon 1982).

143. *Id.* § 8322.

144. *Id.* §§ 8324-83.

145. 263 Pa. Super. 174, 397 A.2d 803 (1979).

146. *Id.* at 177, 397 A.2d at 804.

147. *Id.* at 177-78, 397 A.2d at 804.

148. The ultimate issue involved the effect of a release obtained by the negligent driver—in return for a \$15,000 settlement—upon the later lawsuit against the other tort-feasors. *Id.* at 178 n.1, 397 A.2d at 805 n.1. The release issue is not pertinent to the present discussion.

149. *Id.*

150. *Id.* at 179 n.4, 397 A.2d at 805 n.4 (quoting BLACK'S LAW DICTIONARY 1661 (4th ed. 1968)).

common neglect such other is injured.”¹⁵¹ The court held that “[t]he acts of the original wrongdoer . . . are severable as to time, neither having the opportunity to guard against the other’s acts, and each breaching a different duty owed to the injured plaintiff.”¹⁵² The court then held that the motorist whose negligence resulted in the plaintiff motorist’s injuries and the physician who later aggravated those injuries were not joint tort-feasors.¹⁵³

Several years later, in *Pratt v. Stein*,¹⁵⁴ the court clarified the joint tort-feasor doctrine, especially as it related to the duty aspects. *Pratt* involved injuries suffered by the plaintiff whose automobile was struck from the rear by another vehicle. The plaintiff was hospitalized as a result of these injuries.¹⁵⁵ The plaintiff, Pratt, was subsequently referred to two of the defendants, Doctors Stein and Kambin. Stein, after several examinations, operated on the plaintiff’s back on December 31, 1964.¹⁵⁶ A resultant infection at the operative site was treated by both doctors with antibiotics, and on January 26, 1965, a second operation was performed by Kambin.¹⁵⁷ Upon discharge, plaintiff, who was left totally immobilized and deaf, subsequently filed separate actions against the negligent motorists and against the two doctors and the hospital.¹⁵⁸ The doctors were alleged to have been jointly and severably liable as joint tort-feasors for negligent treatment.¹⁵⁹

The majority rejected the doctors’ reliance on *Lasprogata* for the proposition that they as doctors could not be found liable as joint tort-feasors. The court held that the acts were not sufficiently severable as to time, that they had had an opportunity to guard against each others’ negligent acts, and, perhaps most importantly, that they each owed the same general duty to the plaintiff—to exercise reasonable medical care.¹⁶⁰ The two doctors were held to be

151. *Id.* (quoting BLACK’S LAW DICTIONARY 973 (4th ed. 1968)).

152. *Id.* at 179, 397 A.2d at 805 (emphasis added).

153. *Id.*

154. 298 Pa. Super. 92, 444 A.2d 674 (1982).

155. *Id.* at 102, 444 A.2d at 680.

156. *Id.* at 103, 444 A.2d at 680. The operation involved a laminectomy with a discectomy and a fusion of two vertebrae in the plaintiff’s spine. *Id.*

157. *Id.* This operation was done in order to open and drain the infected area and also to remove the bones engrafted during the prior fusion. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 150, 444 A.2d at 704-05. The court stated that defendant’s reliance on *Lasprogata* was misplaced because the holding there was limited to the proposition that “the original wrongdoer, a negligent motorist, and the negligent physician who subsequently aggravated the original, or caused a new, injury were not joint tort-feasors.” *Id.* at 150, 444

joint tort-feasors.¹⁶¹ The duty held by joint tort-feasors, therefore, can be a general duty owed to the plaintiff. By analogy, there would seem to be a similar general duty owed to the public at large, which has a right to be protected from the disastrous consequences of drunken driving.¹⁶²

It is apparent from the case law regarding joint tort-feasors that the *Klein* decision should have resulted in joint tort-feasor liability. The statement made by the court in *Lasprogata* that the tort cannot be joint if severable in time is not meant to be read so strictly as to require both parties to act simultaneously, although this is often the case.¹⁶³

It has long been recognized as a matter of law in Pennsylvania that the negligent act of the one joint tort-feasor can occur earlier in time than the negligent act of the other joint tort-feasors. An early decision, *O'Malley v. Laurel Line Bus Co.*,¹⁶⁴ involved a bus line whose driver negligently discharged a passenger into the street, after which the passenger was struck by a negligent motorist.¹⁶⁵ The court stated:

If two or more negligences are existing at the time of an injury and concur in producing it, the fact that one preceded the other slightly in point of time is a matter of no moment, and the rule as to concurrent negligence, under which both the parties are held jointly and severably liable, and not that of proximate and remote cause, will be applied.¹⁶⁶

What is important is that the original tort-feasor first placed the plaintiff in peril and this negligence continued until the second tort-feasor transforms the peril into an injury.¹⁶⁷

A.2d at 704.

161. *Id.* at 150-51 n.50, 444 A.2d at 705 n.50.

162. *See supra* note 122 and accompanying text.

163. For examples of immediately concurring acts of negligence, see generally Hilbert v. Roth, 395 Pa. 270, 149 A.2d 648 (1959) (the plaintiff was injured when the automobile he was driving was struck by one defendant who at the time was drag racing with the second defendant); Davis v. Miller, 305 Pa. 348, 123 A.2d 422 (1956) (the plaintiffs were passengers in an automobile driven by one defendant who collided with the other defendant); Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368 (1951) (one defendant in order to avoid the second defendant at an intersection swerved his truck into the oncoming lane of traffic with a resultant collision with the plaintiff); Davenport v. Evans, 360 Pa. 74, 60 A.2d 30 (1948) (one defendant truck driver attempted to make a turn without signaling and second defendant truck driver following behind swerved to avoid the collision and struck head-on with plaintiff); Long v. Thomasberger, 14 D. & C.2d 30 (C.P. Cambria Cty. 1958) (plaintiff guest sued host driver and driver of the other automobile for injuries resulting from the collision).

164. 311 Pa. 251, 166 A. 868 (1933).

165. *Id.* at 253-54, 166 A. at 869.

166. *Id.* at 255, 166 A. at 869.

167. *Coyne v. Pittsburgh Rys. Co.*, 393 Pa. 326, 335-36, 141 A.2d 830, 835 (1958) (in-

While there are indeed limits to the length of permissible time between the initial and final acts of negligence,¹⁶⁸ it would seem that a social host furnishing alcohol to a visibly intoxicated guest and the resultant accident would fall well within permissible limits. Of particular interest is *Diehl v. Fidelity Philadelphia Trust Co.*,¹⁶⁹ which involved injuries suffered by a plaintiff who slipped and fell on ice that had accumulated on the sidewalk.¹⁷⁰ The ice was formed by steam which the first defendant, Metropolitan Life Insurance Company, negligently allowed to escape over the sidewalk of the second defendant, Fidelity Trust. The steam condensed, fell to the sidewalk, and formed ice. Enough time had elapsed to allow Fidelity to be charged with notice and thus negligence for failure to remove it.¹⁷¹ The court thus held that both defendants were jointly and severally liable.¹⁷²

While the time between acts is certainly not without limits,¹⁷³ it would seem that the period in *Klein* should have fallen within permissible limits.¹⁷⁴ The typical social host situation involves the serving of alcohol to an intoxicated guest who is then involved in an automobile accident within the next several hours while still under the influence of the alcohol.¹⁷⁵ There can be little doubt that

volving the negligent discharge of a streetcar passenger who was then struck by a passing motorist).

168. See *supra* notes 145-53 and accompanying text.

169. 159 Pa. Super. 513, 49 A.2d 190 (1946).

170. *Id.* at 515, 49 A.2d at 191.

171. *Id.* at 515-16, 49 A.2d at 191-92.

172. *Id.* at 518, 49 A.2d at 192.

173. See *supra* notes 145-53 and accompanying text.

There could conceivably be quite some period of time between the original and final acts of negligence. In *Stearns v. Mount Lebanon Twp.*, 167 Pa. Super. 341, 74 A.2d 779 (1950), the plaintiff slipped and fell on a public sidewalk. The township was charged with negligently constructing the sidewalk at too steep of a grade, and the property owner responsible for its upkeep was alleged to have negligently allowed the sidewalk to become slippery. The court conceded that the property owners may have been jointly liable with the township. *Id.* at 342-44, 74 A.2d 780-81. No mention was made of the length of time between the acts of negligence though it is conceivable that this joint liability could extend to a period of several months before it would become too remote in time.

174. No court, however, has defined the permissible limits of time. See *Smith v. Fenner*, 399 Pa. 633, 161 A.2d 150 (1960). The plaintiff, Smith, was helping two of the defendants, Falcone and McBeth, to disengage the bumpers of their respective automobiles which were interlocked on the highway when an automobile driven by the third defendant, Fenner, struck Smith. *Id.* at 634, 161 A.2d at 151. The court held that all three were joint tortfeasors. *Id.* at 642, 161 A.2d at 155. While the court again failed to state how far apart in time the two acts of negligence were, it may well have been several hours, i.e., the amount of time involved in most social host liability situations.

175. See 96 N.J. at 541, 476 A.2d at 1220. The accident in *Kelly* occurred twenty-five minutes after the guest had left the host's residence. *Id.* The *Klein* decision only states that

the social host situation fits squarely within the concept of joint tort-feasors, and the *Klein* majority's reasons for speaking of a sole proximate cause are on unsteady ground.¹⁷⁶

V. CONCLUSION

The decision of the Pennsylvania Supreme Court in *Klein* is an unfortunate failure of judicial reasoning. Pennsylvania courts recognize that the common law must adapt to modern conditions in an ever-changing society. Having decided not to base the decision on deference to the legislature, the *Klein* majority attempted to provide a sound justification for the denial of social host liability on the basis of common law negligence principles. All of the elements of negligence which are necessary to find social host liability, however, exist as a matter of law within the Commonwealth, including most importantly the duty owed to the public to refrain from the creation of unreasonable risks. The court's adherence to the often repeated statement that it is the consumption rather than the furnishing of alcohol, which is the proximate cause of any subsequent occurrence is simply not supportable in light of modern jurisprudence.

The ultimate losers are the members of the innocent public who must suffer the consequences of drunken driving. The Commonwealth recognizes criminal liability for the individual who places a firearm in the hands of a person whom the provider has reasonable cause to believe has violent criminal tendencies or is of unsteady character.¹⁷⁷ The liability of a social host is no different. The *Klein* court's failure to extend tort liability to the social host is a misapplication of the body of Pennsylvania jurisprudence.

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the subsequent accident occurred the same day, presumably within a matter of a few hours. *Klein*, 470 A.2d at 508.

In fact, had the court recognized social host liability, it is possible that the host might have escaped liability due to the intervening negligence of a tavernkeeper, who had served the guest after he left his host's residence, but prior to the collision. *Id.*

176. See *Schiele v. Motor Freight Express, Inc.*, 348 Pa. 525, 36 A.2d 467 (1944) (that an act is the proximate cause does not mean that it is the sole proximate cause).

177. 18 PA. CONS. STAT. ANN. § 6110 (Purdon 1983). The statute states:

No person shall deliver a firearm to any person under the age of 18 years, or to one he has reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind.

Id.